Supreme Court, U.S.
FILED

No. 011844 APR 11 2002

OFFICE OF THE CLERK

In The Supreme Court of the United States

SYLVESTER AARON BAKER,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Virginia

---

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Where the affidavit filed by a law enforcement officer in support of a request for a search warrant of the defendant's residence obviously lacked probable cause, did the Magistrate, who failed to inquire and determine that said affidavit was legally insufficient and thereafter delivered the search warrant within three minutes to the requesting officer, who also executed the search warrant, so wholly abandon her neutral judicial role that the good faith exception to the exclusionary rule announced by the United States Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984) and its progeny does not apply to the fruits of the search and requires that evidence seized thereby be suppressed?

PARTIES

A. The name of the Petitioner and the Respondent are as follows:

Petitioner	SYLVESTER AARON BAKER
Respondent	COMMONWEALTH OF VIRGINIA
Attorney	HONORABLE JERRY W. KILGORE Attorney General of Virginia and Kathleen B. Martin, Esquire Assistant Attorney General 900 East Main Street Richmond, Virginia, 23219 Telephone: (804) 786-2071

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CONSTITUTION OF THE UNITED STATES OF AMERICA

4th Amendment to the Constitution	*passim*

GROUNDS OF JURISDICTION

(i) The orders sought to be reviewed by this Honorable Court are an unpublished decision of the Court of Appeals of Virginia entered on June 19, 2001 affirming the denial by the trial court of the petitioner's motion to suppress and the conviction of the petitioner, and

(ii) The orders of the Supreme Court of Virginia dated November, 9, 2001, refusing petitioner's petition for appeal, and January 11, 2002, refusing a rehearing of petitioner's petition for appeal.

(iii) This Court has jurisdiction over said final orders under 28 U.S.C § 1257.

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Pittsylvania County, Virginia, Sheriff's Investigator J. W. Tate prepared an affidavit under oath for a search warrant on August 17, 1999 and presented the affidavit to Pittsylvania County Magistrate Joyce W. Crews at 7: 04 p.m.

The affidavit named as the object of the search a residence, an off-white mobile home with blue trim and a wooden ramp, located on State Road 699 (Brownsville Heights Road) in Pittsylvania County, Virginia and its curtilage as well as any persons found to be in the said residence or on its curtilage.

The things named to be searched for in the affidavit and search warrant were: cocaine base (crack cocaine), scales, records, narcotic paraphernalia (sic) and United States currency.

The probable cause sworn to by Investigator Tate as the basis for the request was, (1) that an (unnamed) confidential informant had visited the residence within forty-eight (48) hours and reported that he saw crack cocaine on the premises; (2) that cocaine remained on the premises when he left and (3) that persons at the residence keep cocaine on their person.

Investigator Tate also swore to the credibility or reliability of the unnamed informant by stating that the informant had provided information in the past that was true and reliable; that the informant was aware of what crack

cocaine is and looks like; and that the Pittsylvania County Sheriff's Department had received numerous complaints in the past regarding narcotic activity at the residence sought to be searched.

Based on the above information Magistrate Crews issued a search warrant at 7:07 p.m. on August 17, 1999 for the described property and any persons found. The search warrant was executed by Investigator Tate at 10:56 a.m. on the following day.

Pittsylvania County Sheriff's Deputies seized one 9 mm handgun and ammunition, scales, three bags containing a grassy type substance, a bag of lettuce, a chain saw, two mobile cell phones, a radio scanner, $184.00 in currency, a razor and an Apple Power Book (a laptop computer) with disk from inside the mobile home. No cocaine or crack cocaine was found either inside the residence or on the curtilage as a result of the search.

The .9mm handgun was found under the bed pad of Sylvester Aaron Baker, a paraplegic resident of the mobile home. Baker was arrested in August 18, 1999 on warrants alleging violation of Virginia Code § 18.2-308.2, Possession of a Firearm after having been Convicted of a Felony, and violation of Virginia Code § 18.2-250.1, possession of marijuana.

On January 20, 2000 Baker filed a motion in the Circuit Court of Pittsylvania County, Virginia that all evidence and statements, direct or derivative, deriving from the Search and Seizure Warrant issued on August 18, 1999, be suppressed as the fruit of an unlawful search in violation of his rights under the Fourth Amendment to the Constitution of the United States against unreasonable searches and seizures.

The Circuit Court of Pittsylvania County, Virginia heard argument from counsel for the petitioner on Baker's motion to suppress on March 8, 2000 and took said motion under advisement.

On March 31, 2000 the Court denied petitioner's Motion to Suppress, ruling that while there, "...may have been some

problems with the search warrant", the defense of "good faith" applied.

The petitioner was arraigned in the Circuit Court of Pittsylvania County, Virginia and pled not guilty to indictments for violation of Virginia Code § 18.2-308.2, Possession of a Firearm after having been Convicted of a Felony, and for violation of Virginia Code § 18.2-250.1, Possession of Marijuana. The petitioner waived his Right to trial by a jury. The Commonwealth voluntarily dismissed the indictment for possession of marijuana.

The Trial Court found the petitioner guilty of violation of Virginia Code § 18.2-308.2, Possession of a Firearm after having been Convicted of Felony and on May 10, 2000 sentenced Baker to a term of four (4) years in the Virginia Penitentiary, two (2) years of which sentence were suspended upon certain terms and conditions.

The Court of Appeals of Virginia granted petitioner a Writ of Error on November 29, 2000 to two issues raised on appeal, that the affidavit for a search warrant was conclusory in nature and failed to provide the magistrate with sufficient information to support a finding of probable cause to issue the search warrant, and that the good faith exception to the exclusionary rule does not apply to the evidence seized pursuant to the search warrant as the magistrate wholly abandoned her judicial role and that the affidavit so lacked indicia of probable cause as to render official belief in its existence unreasonable.

The Court of Appeals of Virginia (Memorandum Opinion by Judge Coleman dated June 19, 2001) found that although the affidavit did not provide adequate indicia of the informant's reliability to establish probable cause, Deputy Tate acted in good faith reliance on the validity of the search warrant.

The Court of Appeals of Virginia conducted a Fourth Amendment analysis and found that the magistrate did not have sufficient probable cause from the affidavit to have issued the search warrant.

The Court of Appeals then applied the "good faith reliance" exception to the exclusionary rule announced in *United States v. Leon.*

The Court of Appeals of Virginia found that, "Unless a magistrate has abandoned his detached and neutral role, suppression is only appropriate if an officer is dishonest or reckless in preparing his affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." and affirmed the judgment of the trial court.

The opinion of the Court of Appeals of Virginia failed to address an issue raised by the petitioner, whether or not the magistrate who issued the search warrant had abandoned her neutral judicial role, thus rendering the "good faith" exception to the exclusionary rule inapplicable to the facts of this case.

Sylvester Baker appealed to The Supreme Court of Virginia, which refused his appeal by order entered November 9, 2001. The Supreme Court of Virginia further refused petitioner's petition to set aside the judgment rendered November 9, 2001 and grant a rehearing by order entered January 11, 2002.

ARGUMENT

This Court has jurisdiction to review a state supreme court's decision when the state-court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law or involve the final interpretation of important issues under the federal constitution. *Arizona v. Evans*, 514 U.S. 1 (1995).

Virginia employs the exclusionary rule of *Weeks v. United States*, 232 U.S. 283 (1914) as applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), that evidence obtained in violation of constitutional prohibitions against unreasonable searches and seizures may not be used against an accused. *Janis v. Commonwealth*, 22 Va. App. 646, 472 S.E.2d 649 (1996).

Under Virginia principles of appellate review The Court of Appeals of Virginia examined the evidence in the light most favorable to the prevailing party, the Commonwealth, granting to it all reasonable inferences fairly deductible therefrom. *Jones v. Commonwealth*, 26 Va. App. 154, 493 S.E.2d 677 (1997). *Green v. Commonwealth*, 32 Va. App. 438, 528 S.E.2d 187 (2000).

Under Virginia case law, in reviewing a trial court's denial of a defendant's motion to suppress, the burden is on the Appellant to show that the ruling, when the evidence is fairly considered, constituted reversible error. *McGee v. Commonwealth*, 23 Va. App. 193, 487 S.E.2d 259 (1997).

The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The presence of a search warrant serves a high function by interposing a magistrate between the citizen and the police so that an objective mind could weigh the need to invade privacy in order to enforce the law. *Illinois v. Rodriguez*, 497 U.S. 177, 191 (1990).

A warrant authorized by a neutral and detached judicial officer, such as a magistrate, is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

The issuing magistrate must receive sufficient information, under oath or affirmation, to support a finding of probable cause, a substantial basis, for concluding that the search will uncover evidence of wrongdoing. *Illinois v. Gates*, 462 U.S. 213 (1983) imposed a "totality of the circumstances" test for determining probable cause.

The Supreme Court of Virginia defined this "probable cause" in *Saunders v. Commonwealth.* 218 Va. 294, 300, 237 S.E.2d 150, 155 (1977),

> "Probable cause, as the very name implies, deals with probabilities. These are not technical; they are the factual and practical considerations in every day life on which reasonable and prudent men, not legal technicians, act. Probable cause exists when the facts and circumstances are within the arresting officer's knowledge and of which he has reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

"Where the basis for concluding that probable cause exists rests upon information provided by an informer, one focus of the inquiry must be upon whether the magistrate could determine the informer's honesty, veracity, and basis of knowledge." *Boyd v. Commonwealth*, 12 Va. App. 179, 187, 402 S.E.2d 914, 919 (1991).

This veracity may be established by independent police corroboration of the details provided by the informant through interviews of victims or other information, especially where an informant reports a crime committed in his presence, but not one in which he was involved, or one in which he was the victim. *Lester v. Commonwealth*, 30 Va. App. 498, 518 S.E.2d 318 (1999).

The magistrate who issued the search warrant upon which the evidence sought to be suppressed was seized was required to determine whether or not the statements contained in Paragraph No. 6 of Sheriff's Investigator J. W. Tate's affidavit concerning the informant's credibility or reliability had sufficient particularity to cloak it with probable cause. Where the basis for concluding that probable cause exists rests upon information provided by an informant, particularly an unnamed one, one focus of the magistrate's inquiry must be upon whether the magistrate could determine the informant's honesty, veracity and basis of knowledge. *Corey v. Commonwealth*, 8 Va. App. 281, 381 S.E.2d 19 (1989).

The informant did not appear before the magistrate to be questioned under oath about this information, *Polson v. Commonwealth*, 255 Va. 500, 498 S.E.2d 924 (1998); therefore, the Magistrate had to rely only on the information contained in the affidavit as to reliability and basis of knowledge.

One of the indices of reliability given in this affidavit was that the Pittsylvania County Sheriff's Office had received numerous complaints in the past regarding narcotic activity at the residence described. The affidavit did not state when these complaints were received, except to say vaguely, "in the past", nor did it state the number of complaints made, whether two or two hundred, or by whom made. The reference to these complaints, without more information as to time, number and knowledge of the complainant(s), was merely conclusory and did not suffice as a sufficient allegation of material fact to support a probable cause determination. *Wiles v. Commonwealth*, 209 Va. 282, 163 S.E. 595, (1968).

The second basis of reliability cited by Investigator Tate was that the informant had provided information to the Pittsylvania County Sheriff's Office in the past that had been true and reliable.

The affidavit did not inform the magistrate whether or not the information given by the informant concerned criminal activity; whether or not the information resulted in any arrests or convictions, *Robinson v. Commonwealth*, 19 Va. App. 642, 453 S.E.2d 916 (1995); whether or not the information had been independently verified through other sources.

In short, the "bare bones" assertion by Investigator Tate that the information previously provided by this informant had been true and reliable was not so particularly stated as to remove it from being a mere conclusion. The magistrate had no means of determining from the affidavit itself the reliability of this informant. *Spinelli v. United States*, 393 U.S. 410 (1969).

Tate's affidavit does not expand on the source of the informant's particular knowledge of cocaine or provide any corroboration to the magistrate within the affidavit so as to enable the magistrate to evaluate the reliability of the informant and/or his information.

Both the trial court and the Court of Appeals of Virginia, and the Supreme Court of Virginia, which affirmed the decision of the Court of Appeals by refusing to grant a writ of error, found that the conclusory statements of Investigator Tate were deficient to support the issuance of the search warrant because they contained no substantial factual allegations for its foundation. *Garza v. Commonwealth*, 228 Va. 559, 323 S.E.2d 127 (1984).

Therefore, both the trial court and The Court of Appeals of Virginia ruled that the magistrate, "did not have sufficient probable cause from the affidavit to have issued the search warrant."

Although the affidavit by Investigator Tate failed to provide the magistrate with a substantial basis for a finding of probable cause, the trial court ruled that the good faith rule established by *United States v. Leon*, 468 U.S. 897 (1984), applied. The Court of Appeals of Virginia agreed and the Supreme Court of Virginia refused to review that decision, thus affirming it.

Virginia has embraced and applied the good faith exception set out to the exclusionary rule in *Leon*. *McCary v. Commonwealth*, 228 Va. 219, 232, 321 S.E.2d 637, 644 (1984). Evidence seized pursuant to a search warrant is nevertheless admissible, even with a lack of probable cause, if the officer executing the search warrant reasonably believes that the warrant is valid. *Lanier v. Commonwealth*, 10 Va. App. 541, 394 S.E.2d 495 (1990). However, the good faith exception is not available where:

(1) the magistrate was mislead by information in the affidavit which the affiant knew was false or should have known was false;

(2) the issuing magistrate wholly abandoned his judicial role;

(3) the warrant was based on an affidavit "so lacking in indicia of probable cause" as to render official belief in its existence unreasonable; or

(4) where the warrant was so facially deficient that an executing officer could not reasonably have assumed it was valid. *Atkins v. Commonwealth*, 9 Va. App. 462, 389 S.E.2d 179 (1990).

An issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

The magistrate's determination is given greater reliability in part because the magistrate usually has greater time for deliberation and greater familiarity through training or education with the legal concepts regarding probable cause. *Mally v. Briggs*, 475 U.S. 335, 352-353 (1986).

A magistrate is required to make a probable cause determination in a neutral and detached manner. *Lo-Ji Sales v. New York*, 442 U.S. 319, 326 (1979). However, the affidavit presented must recite the necessary facts and underlying circumstances if the magistrate is to perform his detached and neutral function and not serve merely as a rubber stamp for the police. *United States v. Ventresca*, 380 U.S. 102 (1965).

Magistrate Crews issued the search warrant for the residence of the petitioner, its curtilage and any persons found to be in the residence or on its curtilage, only three (3) minutes after the affidavit was completed and presented by Investigator Tate. There was no appreciable interval during which a reasonable the magistrate could have exercised her judicial function to determine the veracity of the informant, the basis of the informant's knowledge, or the additional information stated by Investigator Tate in his affidavit in support of the request for the search warrant.

The point of the Fourth Amendment is that its protection requires that the inferences reasonable men could draw from the evidence be drawn by a neutral and detached magistrate.

The magistrate received Tate's affidavit, prepared and signed the search warrant and delivered the search warrant to Investigator Tate in so short a period of time as to lead a reasonable man to infer that the magistrate did not read and consider the probable cause affidavit, but made an erroneous determination of probable cause, without a substantial basis to do so, thereby wholly abandoning her neutral and detached judicial role and that the issuance of the search warrant was nothing more than a "rubber stamp" of the investigator's request. *United States v. Ventresca*, 380 U.S. 102 (1965).

Investigator Tate knew at the time he prepared and filed his affidavit that the statements contained in the affidavit so lacked indicia of probable cause as to prevent a neutral and detached magistrate from drawing the necessary inferences sufficient to justify the issuance of a search warrant.

These numerous and substantial defects in his affidavit rendered Tate's assumed "belief" that sufficient probable cause existed for its issuance by the magistrate so unreasonable that Tate, could not himself, as a reasonable police officer, have assumed that the warrant was valid.

Although Virginia has adopted a deferential standard of review to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant, *Williams v. Commonwealth*, 4 Va. App. 53, 68, 354 S.E.2d 79, 87 (1987), the *Leon* test for good faith reliance is an objective one based solely on the facts presented to the magistrate and does not extend to additional information or facts known to the requesting officer and not presented to the magistrate. *United States v. Hove*, 848 F.2d 137 (9th Cir.1988). There are times when it is plainly evident that a magistrate had no business issuing a warrant, *Illinois v. Gates*, 462 U.S. 213, 264 (1983) (WHITE, J., concurring in judgment) and in such instances when the magistrate has wholly abandoned his judicial role then the good faith exception to the exclusionary rule would not be reasonable. Nor would a reasonable officer have reasonable grounds for believing that the

warrant was properly issued. *United States v. Hyppolite*, 65 *F.3d* 1151, 1156 (1995).

Although a reviewing court will pay substantial deference to a judicial determination of probable cause, the Supreme Court of the United States has said that, "the court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Aguilar v. Texas*, 378 U.S. 108, 112 (1964).

If the affidavit does not supply the magistrate with a substantial basis for determining the existence of probable cause, the third exception to the good faith test applies. *United States v. Wilhelm*, 80 F.3d 116 (4th Cir.1996). Where probable cause is missing, the warrant cannot survive.

Where a magistrate not only lacked a substantial basis for determining the existence of probable cause, but failed to require the production of the necessary indicia, and thereby made no inquiry at all, the magistrate wholly abandons her judicial role and the good faith exception cannot apply.

The Court of Appeals of Virginia did not address this particular issue in its decision dated June 19, 2001, although the issue was argued by Baker in both his brief and at oral argument. This silence is especially surprising in light of The Court of Appeal's affirmation of the ruling by the trial court that the affidavit for the search warrant filed by Investigator Tate was fatally deficient.

The Court of Appeals chose to address the issue of whether or not the evidence at trial showed that the requesting officer acted dishonestly or recklessly in obtaining the warrant, issues which were never raised by the petitioner at trial or on appeal, instead of whether or not the magistrate's obvious abandonment of her judicial role enabled her rubber stamp to make an otherwise unreasonable search reasonable. *Michigan v. Clifford*, 464 U.S. 287, 302 (1984) and thus negated the "good faith" exception to the exclusionary rule.

The Supreme Court of Virginia applied the *Leon* test to the issue of the reasonableness of an officer's reliance on just

such a defective search warrant in *Derr v. Commonwealth*, 242 Va. 413, 410 S.E.2d 662 (1991) and in *Poulson v. Commonwealth*, 255 Va. 500, 498 S.E.2d 924 (1998), and stated, "the (good faith) exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role. [I]n such circumstances, no reasonably well trained officer should rely on the warrant. Nor would an officer manifest objective good faith in relying on a warrant 'so lacking in indicia of probable cause as to render official belief in its existence unreasonable'", citing *Leon*, [*Derr*, page 423] and [*Poulson*, page 504].

In *Poulson* The Virginia Supreme Court analyzed and rejected the defendant's claim that the evidence should be suppressed because of a similar defective affidavit. However, the Virginia Supreme Court pointed out as evidence that the magistrate had not abandoned his judicial role that the magistrate had personally questioned the informant about the informant's knowledge of drug activity in the area. There was no such independent exercise of this magistrate's judicial function on August 17, 1999, nor could there be; the informant was never presented or even named by the officer. All the evidence the magistrate had was an insufficient affidavit, which she obviously ignored or failed to read.

Under *Leon* exclusion remains appropriate where a magistrate failed to perform his neutral and detached function. *United States v. Edwards*, 798 F.2d 686 (4th Cir.1986).

The court must decide whether or not to apply the exclusionary rule. In *Illinois v. Krull*, 480 U.S. 340 (1987) the Court cited the holding in *Leon* that the exclusionary rule should not be applied to evidence obtained by a police officer whose reliance on a search warrant issued by a neutral magistrate was objectively reasonable because there is no sound reason to apply the rule as a means of deterring conduct on the part of judicial officers responsible for issuing warrants on three grounds:

First, that the exclusionary rule was designed to deter police misconduct not punish judicial errors.

Second, that there was no evidence suggesting magistrates or judges are inclined to ignore or subvert the Fourth Amendment to the extent that it requires the extreme sanction of exclusion.

Third, that there was no basis to believe that exclusion would have a significant deterrent effect on the issuing judicial officers.

However, in *Murray v. United States*, 487 U.S. 533 (1988), the Court reaffirmed that the exclusionary rule's purpose is principally to deter violations of the Fourth Amendment and compels respect for this constitutional guaranty in the only effective available way, by removing the incentive to disregard it. *Id*, 542.

This Court has been reluctant to expand the exclusionary rule beyond the scope of police or law enforcement officers on the grounds that there is little or no deterrence effected. This has allowed officers to use magistrates or other judicial officers as a shield to evade Fourth Amendments constraints.

If a law enforcement officer can obtain a search warrant either through convincing a magistrate that a clearly insufficient affidavit will support a search warrant, either because of the magistrate's lack of legal knowledge or with the willing assistance of a magistrate, without the sanction of suppression of the evidence seized, the exclusionary rule provides no disincentive to Fourth Amendment violations.

This rationale was followed by the United States Court of Appeals for the Fourth Circuit in *United States v. Wilhelm*, 80 F.3rd 116 (4th Cir. 1996), a case remarkably similar in facts to this prosecution. In *Wilhelm* a North Carolina state police officer obtained a search warrant based on a vague tip that the defendant had marijuana in his home. The court ruled that the officer's affidavit, which contained the same imprecise references to drug possession and drug transactions at the residence, directions to the residence and unsupported conclusions about the reliability of the un-named informant as the affidavit filed by Investigator Tate in this case, fell far short of providing adequate support for the magistrate's finding of probable cause for a search warrant.

The Court next considered whether or not the "good faith" exclusion in *Leon* should be applied, decided it should not and reversed the District Court's denial of the defendant's motion to suppress. The Fourth Circuit Court stated, "We find that the good-faith exception to the exclusionary rule should not apply in this case due to the 'bare bones' nature of the affidavit, and because the state magistrate could not have acted other than a 'rubber stamp' in approving such affidavit." *Id.* Page 122.

In reaching this decision the Fourth Circuit Court of Appeals followed similar decisions in *United States v. Leake,* 998 F.2d 1359 (6th Cir. 1993) (detective who sought a search warrant did not act in good faith, because he knew he needed to provide corroboration of the tip, but did not), *United States v. Baxter*, 889 F.2d 731 (6th Cir. 1989) (refusing to apply good faith exception where officer involved had to realize that the source of his information was an unknown party who was unavailable and could not be demonstrated to be reliable,), *United States v. Laury*, 985 F.2d 1293 (5th Cir. 1993) and *United States v. Barrington*, 806 F.2d 529 (5th Cir. 1986) (bare bones affidavit failed to provide sufficient information to allow a neutral determination of probable cause, and the police officer had no good faith reason to believe the magistrate had made a probable cause determination.).

The Fourth Circuit Court noted with approval that the Fifth Circuit Court in *Barrington* had cited *Leon's* footnote 24, and ruled that, "[I]f one cannot use a bare bones affidavit and then rely on an ignorant colleague to conduct the search, he cannot himself conduct the search based on his own bare bones affidavit."

The affidavit refused in *Wilhelm* did not provide the magistrate with a substantial basis for determining the existence of probable cause and the magistrate appeared to act as a rubber stamp in finding the affidavit sufficient to establish probable cause. *Wilhelm*, page 124.

CONCLUSION

In the instant case the search was unconstitutional because it was based on a warrant unsupported by probable cause and the officer could not have reasonably acted on good faith in relying on the warrant.

Therefore, your petitioner respectfully prays The United States Supreme Court grant a Writ of Certorari to the Supreme Court of Virginia.

SYLVESTER AARON BAKER
By Counsel

Counsel:

_____

J. Patterson Rogers, 3rd.

APPENDIX

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AFFIDAVIT FOR SEARCH WARRANT
CASE # (99022681)
FILE NO._____
APPLICANT (J.W.TATE)
TITLE (INVESTIGATOR)
ADDRESS
(PITTSYLVANIA COUNTY SHERIFF'S OFFICE,
CHATHAM VA. 24531)
CERTIFIED TO CLERK OF_____
CIRCUIT COURT
ON _____
TITLE _____
SIGNATURE_____
DELIVERED TO CLERK OF_____
CIRCUIT COURT ON_____ BY THE
UNDERSIGNED

TITLE_____
SIGNATURE _____

THE UNDERSIGNED APPLICANT STATES UNDER OATH.

1. A SEARCH IS REQUESTED IN RELATION TO AN OFFENSE SUBSTANTIALLY DESCRIBED AS FOLLOWS :

18.2-248 DISTRIBUTION OF COCAINE

2.THE PLACE, PERSON, OR THING TO BE SEARCHED IS DESCRIBED AS FOLLOWS . THE RESIDENCE AND ITS CURTELAGE AND ANY PERSONS FOUND TO BE IN THE RESIDENCE OR ON ITS CURTELAGE, LOCATED ON STATE ROAD 699 (BROWNSVILLE HEIGHTS ROAD) CHATHAM VIRGINIA, IN PITTSYLVANIA COUNTY.
THE MOBILE HOME IS THE EIGHTH RESIDENCE ON THE LEFT AS YOU TRAVEL DOWN BROWNSVILLE

HEIGHTS ROAD, AND IS APPROX. .8 OF A MILE FROM THE INTERSECTION OF STATE ROAD 832 (HALIFAX RD .ANO STATE
ROAD 699 (BROWINVILLE HEIGHTS ROAD).
THE MOBILE HOME IS OFF WHITE WITH BLUE TRIM IN COLOR WITH, A WOODEN RAMP TYPE PORCH.

3. THE THINGS OR PERSONS TO BE SEARCH FOR ARE DESCRIBED AS FOLLOWS:

COCAINE (CRACK), SCALES, RECORDS, NARACOTIC PARAPHERNALIA AND U.S. CURRENCY

THE STATEMENTS ABOVE ARE TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

TITLE (INVESTIGATOR)

APPLICANT J.W.TATE

TRANSCRIBED ANO SWORN TO BEFORE ME THIS DAY 8/17/99 7:04 P.M.

JOYCE W. CREWS

Magistrate

CASE # (99022681)
4.THE MATERIAL FACTS CONSTITUTING PROBABLE CAUSE THAT THE SEARCH SHOULD BE MADE ARE:

WITHIN THE PAST FORTY-EIGHT HOURS, AN INFOR-MANT VISITED THE RESIDENCE DESCRIBED IN NUMBER TWO OF THIS AFFIVDAVIT AND SAW CRACK COCAINE ON THE PREMISES, CRACK COCAINE REMAINED ON THE PREMISES WHEN THE INFORMANT LEFT THE RESIDENCE. THE

INFORMANT ALSO STATED THAT THE PERSONS AT THE RESIDENCE ALSO KEEP COCAINE ON THERE (sic) PERSON.

5.THE OBJECT, THINGS OR PERSON SEARCHED FOR CONSTITUTES EVIDENCE OF THE COMMISSION OF SUCH OFFENSE.

6.( ) I HAVE PERSONAL KNOWLEDGE OF THE FACTS SET FORTH IN THIS AFFIDAVIT OR

(X) I WAS ADVISED OF THE FACTS. SET FORTH IN THIS AFFIDAVIT, IN WHOLE OR IN PART, BY AN INFORMER.

THIS INFORMER'S CREDIBILITY OR THE RELIABILITY OF THE INFORMATION MAY BE DETERMINED FROM THE FOLLOWING FACTS.

THE INFORMANT MENTIONED IN NUMBER FOUR OF THIS AFFIDAVIT HAS PROVIDED INFORMATION TO THE 'PITTSYLVANIA COUNTY SHERIFFS OFFICE IN THE PAST THAT HAS BEEN TRUE AND RELIABLE,THIS INFORMANT ALSO IS AWARE OF WHAT CRACK COCAINE IS AND KNOWS WHAT IT LOOKS LIKE. THE PITTSYLVANIA COUNTY SHERIFFS OFFICE HAS RECIEVED NUMEROUS COMPLAINTS IN THE PAST REGARDING NARCOTIC ACTIVITY AT THE RESIDENCE DESCRIBED IN NUMBER TWO OF THIS AFFIDAVIT.

THE STATEMENTS ABOVE: ARE TRUE AND ACCURATE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

TITLE (INVESTIGATOR)
APPLICANT J.W. TATE

SUBSCRIBED AND SW0RN TO BEFORE ME THIS
8/17/99 7:04 PM

DATE TIME
JOYCE W. CREWS ( )CLERK (X) MAGISTRATE
(J)JUDGE

Filed in the Clerk's Office of the Circuit Court of
Pittsylvania County
the 18 day of August, 1999 at 3: 15 P.M.

H. F. HAYMORE, JR.,

CLERK

By: Judy W. Pierce

Deputy Clerk

SEARCH WARRANT

( ) To the Policeman of a county, city or town
(x) To PITTSYLVANIA COUNTY SHERIFF'S DEPARTMENT

You are hereby commanded in the name of the Commonwealth to forthwith, search either in day or night

.....

THE RESIDENCE AND ITS CURTELAGE AND ANY PERSON FOUND TO BE IN THE RESIDENCE OR ITS CURTELAGE, LOCATED ON STATE ROAD 699 (BROWNSVILLE HEIGHTS ROAD) CHATHAM, VIRGINIA IN PITTSYLVANIA COUNTY. THE MOBILE HOME IS THE EIGHTH RESIDENCE ON THE LEFT AS YOU TRAVEL DOWN BROWNSVILLE HEIGHTS ROAD AND IS APPROXIMATELY .8 OF A MILE FROM THE INTERSECTION OF STATE ROAD 832 (HALIFAX ROAD) AND STATE ROAD 699 (BROWNSVILLE HEIGHTS ROAD). THE MOBILE HOME IS OFF-WHITE BLUE TRIM IN COLOR WITH A WOODEN RAMP TYPE PORCH.

for the following property, objects and/or persons.
COCAINE (CRACK) SCALES, RECORDS, NARCOTIC PARAPHERNALIA AND U.S. CURRENCY.

PROPERTY OBJECTS AND OR PERSONS SOUGHT IN SEARCH

.....

You are further commanded to seize said property, persons and or objects, if they be found and to produce before the PITTSYLVANIA COUNTY CIRCUIT Court an inventory of all property, persons and objects seized.

This search warrant is issued in relation to an offense substantially described as follows:

DISTRIBUTION OF COCAINE § 18.2-248

I, the undersigned have found probable cause to believe that the property or person constitutes evidence of the crime

identified herein or tends to show that the person(s) named or described here in has committed or is committing a crime, and further that the search should be made based on the statements in the attached affidavit sworn to by
INVESTIGATOR :J. W. TATE PCSD

8/17/99 7:07 PM
JOYCE W. CREWS (x) MAGISTRATE

VIRGINIA:

IN THE CIRCUIT COURT OF PITTSYLVANIA COUNTY

COMMONWEALTH OF VIRGINIA,
PLAINTIFF

vs. CR99001300-00
CR99001301-00

SYLVESTER AARON BAKER,
DEFENDANT

MOTION TO SUPPRESS

COMES NOW Sylvester Aaron Baker, Defendant herein, by counsel, and respectfully moves the Court to suppress any and all evidence and statements, direct or derivative, deriving from the execution of a Search & Seizure warrant upon the premises wherein the Defendant resides and from questioning of the Defendant incident thereto for the following reasons:

1. On or about August 17, 1999 at 7 :04 p.m., Deputy Tate of the Pittsylvania County Sheriff's Department sought and obtained a search and seizure warrant for a mobile home located on Brownsville Heights Road in Pittsylvania County, Virginia.
2. An affidavit was filed for said warrant, constituting the alleged probable cause for the issuance thereof. A copy thereof is attached hereto as Exhibit " A."
3. In ¶4 of said affidavit, the probable cause was founded upon the following:

a. A visit to the premises by an informant within the preceding fortv-eight hours (emphasis added;)

b. Observation by the informant of crack cocaine on the premises;

c. That the crack cocaine remained on the premises at the departure of the informant;

d. That the informant stated persons at the residence keep cocaine on there (sic) person.

4. ¶6 of the affidavit alleges that the object, person or thing searched for constitutes commission of such offense.

5. ¶1 of the affidavit defines the suspected offense as "Distribution of Cocaine" (emphasis added;)

6. ¶6 of the affidavit attempts to furnish substantiation of the informer's reliability by alleging:

a. Prior information found to be true and reliable;

b. Informer familiarity with crack cocaine; and

c. Neighborhood complaints regarding "narcotic activity" (emphasis added) at the residence.

7. The affidavit did not request authority to search any persons on the premises.

8. The objects sought to be searched for were: cocaine (crack), scales, records paraphernalia and U.S. currency.

9. A warrant was thereupon issued on August 17. 1999 at 7:07 p.m. for the house and curtilage described above and any persons found thereon. A copy thereof is attached hereto as Exhibit "C."

10. On August 18. 1999 at 10:56 P.M., the warrant was executed and the Defendant, a paraplegic lying on his bed in the premises, was searched incident thereto, certain items being seized from his immediate area.

11. Upon information and belief, the house searched incident to the warrant was not the same described in the warrant.. It is respectfully suggested that said warrant was defective for the following reasons:

1. The credibility of the informant is insufficient corroboration by the allegations of ¶4 of the affidavit;

2. The allegations, even if fully credited and furnishing sufficient basis for issuance of a search warrant, do not constitute a sufficient basis to issue a warrant for the distribution of cocaine, providing no allegation at all as to sales or distribution of the same, the presence of packaging materials, the presence of large quantities of narcotics, the presence of paraphernalia, or any other basis from which an inference of distribution could be made.

3. The warrant accordingly does not identify correctly the offense for which a search could be made.
4. The affidavit does not request a warrant for the search of any persons, but merely of the dwelling. No basis existed for the magistrate to extend the scope of the warrant application beyond its requests.
5. The granting of permission to search "any persons" found on the premises effectively granted a "general warrant", prohibited by the fourth and fourteenth amendments to the United States Constitution.
6. The warrant is over-broad and accordingly unreasonable.

WHEREFORE Defendant respectfully moves the Court to suppress any and all statements, evidence and derivative evidence arising from the execution of the said warrant. .

Sylvester Aaron Baker
By Counsel

Counsel
Rudolph A. Shupik, Jr.
12 North Main St., P.O. Drawer 1079
Chatham, VA 24531
(804) 432-2343
(804) 432-1058 (fax)
VSB #19691

CERTIFICATE

This will certify that a true and accurate copy of the foregoing pleading was mailed to David N. Grimes, Commonwealth's Attorney for Pittsylvania County, Main St.Chatham, VA 24531, on Wednesday, January 20, 1999.

RUDOLPH A. SHUPIK, JR

VIRGINIA :

IN THE CIRCUIT COURT OF PITTSYLVANIA COUNTY

TRANSCRIPT OF HEARING ON MOTION TO SUPPRESS

UPON THE CONVENING OF COURT, on the afternoon of March 6, 2000, the case of COMMONWEALTH OF VIRGINIA v. SYLVESTER AARON BAKER was called at 1:12 o'clock P.M.., with both the Commonwealth and the Defendant announcing ready, the Court Reporter was duly sworn, and the SUPPRESSION HEARING proceeded as follows:

****

DEPUTY CLERK, TERESA FULLER:

THE COURT: Good afternoon, Mr. Shupik
MR. SHUPIK: Good afternoon, your Honor.
THE COURT: Is your client in lock-up?
MR SHUPIK: No, sir. He's a paraplegic, I'm not sure if he's going to be here or not, Judge. He has difficulties getting here. This is on a Motion to Suppress, Judge
THE COURT: Alright, so you don' expect your client to be here. Do you want to proceed without him.
MR. SHUPIK: He indicated he was coming, Judge, but he's not here yet, and we're prepared to go forward without him.
THE COURT: So you're going to waive his appearance today?
MR. SHUPIK: Yes Sir.
THE COURT: Alright, Mr. Shupik, you may proceed.
MR. SHUPIK: Judge, I don't believe there's any evidence necessary. The Motion itself is directed to the Affidavits and the Warrants that were issued. The motion by and large sets out the nature of our objection. There are, there is, a misstatement in the motion itself in paragraph 7, that it did not request authority to search is persons on the premises. A

more careful reading of the second paragraph. I believe it was in the Affidavit, did, in fact incorporate a request for a search, not only of the residence and curtilage, but any person found, so we would not accordingly press that issue. What we have in this case, Judge, is a, What I would suggest is a insufficient affidavit that fails to establish probable case and does not...Okay, apparently Mr. Baker is coming through now, Judge.

(The defendant, Mr. Baker, is now present.)

The Affidavit, itself, Judge, rest on information obtained from an informant, unidentified informant. We suggest that the Affidavit and the reliability of the informant are insufficient. Furthermore this is an any-person warrant. We Would suggest that the any-person criteria, Virginia only has one decision that I know of that squarely meets the any persons test, which was a panel decision that was issued in 1992, I believe it was ....."93", I'm sorry. That is Morton v. Commonwealth, 16 VA.App.946. That was a three Judge panel. The majority found on the any person that that was 0okay under Virginia law. The dissent, however, if the Court will read the opinion, than the majority. The Morton case did not apparently go forward. There was no further appeal. There was a request for an en-bank hearing that was denied, but it was never appealed up to the Virginia Supreme Court. I've not found any other decisions in Virginia dealing with that precise issue. We would suggest that basically the rationale set forth in the dissent in the Morton decision and really arguing from the true decisions of the majority on the case that it is citing is controlling in the Morton decision itself would indicate that the any person issuance has to be supported by some criteria indicating as the Supreme Court, Ybara, in one of its footnotes, it indicted previously that it has to be particularized. When you are seizing a person, searching a person , it has be particularized probable cause as to that person, some reason to be that that person is going to engaged in criminal conduct which is the object of the search

seizure. In the particular case the only thing that is said is that persons on the premises posses narcotics, holding conclusory does not identify any of the particular persons. There's no indications that this gentlemen, who because of his disability is readily identifiable, he is not specified as being a person who was in possession of any narcotics or was dealing with narcotics in any way, so we would suggest that if the Court read the Morton decision carefully and the underlying opinions, that Morton, in fact, dictates that this person search and seizure warrant is over-broad, is prohibitive by the Constitution. It does, in fact ,violate Mr Baker's Constitutional Rights. The other issues that are raised, Judge, relate to the suffiency of the corroboration of the informant. We have a confidential informant. There's no indication as to who this person may be. There's no indication that this person is an anonymous informant, providing information to the officers. We have a statement, which is, I think set forth in paragraph 4 of the Affidavit, which basically says that within the proceeding 48 hours the informant had been on the premises, had observed crack cocaine, and that when he left there was still crack cocaine there, and person in the residence kept cocaine on the person. That's it. Clearly insufficient on its face and the officers recognized that so they knew that they had to obtain some corroboration, and the corroboration that they obtained we would suggest does not meet any Constitutional stand whatsoever not does it bring it up to a Good faith standard, that the corroboration that the officers are offering is that the informant has provided information to the Sheriff's Office in the past that has been true and reliable. Now the very test of the validity of the issues of a search and seizure warrant is the Magistrate's independent determination as to whether the information provided and the person providing it are sufficiently strong toward the issuance of a search and seizure warrant. In this case we don't have any indication of the track record of the informant by an independent basis that the Magistrate can rely on. What we do have is a wholly conclusory statement by a police officer who is the Affiant

saying that this informant told me the truth in the past, and that's basically all that that comes down to. It does not say that he gave me information that led to five prior convictions in the courts of law, that he gave me information that led to arrest, that I've been able to corroborate information that he has provided me in the past. It simply says proved true and reliable. Wholly conclusory conclusion by the officer which is the Affiant seeking the warrant, there is no way that the Magistrate issuing the warrant can make an independent determination as to the reliability of the informant. The second aspect of the bolstering effort is that the informant know what crack cocaine is and knows what it looks like. Well again, there's no corroboration of that, and I would suggest there's absolutely meaningless, except from a standpoint that the Affiant might, or the informant rather, might have believed that he was looking at cocaine. I don't know how he would know that because that's what we do these test for to determine what substances are, but I would suggest that it really adds nothing whatsoever to the Affidavit itself. It's like saying that a confidential informant advised me that he saw a blue car driving down the road and them in corroboration of that, that the informant knows what a car is. I would suggest that adds nothing whatsoever to the corroboration. And then the final aspect of it is that the sheriff's office has received numerous complaints regarding narcotic activity at the residence described through number two. Well, we don't know who those complaints are from. We don't know what the results of the investigations were, or if there were any investigations. Anyone can receive complaints from anybody about anything, and I suggest that that again adds absolutely nothing to bolster the information furnish by the confidential informant, which is the ultimate basis for the issuance of a search and seizure warrant, when we are going to intrude on Fourth Amendment protective privileges, particularly with regard to homes and residences, the warrant has to be issued on probable cause for the offense which is charged. If your look at the affidavit it says that there is some cocaine on the premises and it was there

when the informant left. The offense for which the search and seizure warrant is issued was for distribution of cocaine. The scope of the warrant is to seize cocaine, scales, records, narcotic paraphernalia and United States Currency, based on distribution of cocaine. There is absolutely nothing in that Affidavit that would indicate that there is distribution of cocaine going on, on those premises. The only thing it says, giving full faith and credence to what the informant apparently told the officer was that there was some crack cocaine on the premises and it was there when he left. Thank you, Judge.

THE COURT: How do you deal with the good faith exception of all of that?

MR. SHUPIL: Sir?

THE COURT: The good faith exception, how do you deal with that?

MR. SHUPIK: If the Affidavit on its face, and he information provided to the Magistrate are so inadequate, as I suggest they are in this case, facially invalid, then the good faith exception would not apply is my understand of the Rule, and I would suggest that's precisely the case here. The Affidavit is insufficient and it's certainly insufficient for the offense charge, and what we really have in this cause.

THE COURT: Alright well, I think I have to read the most recent case that was sent back to me, the Commonwealth appealed. I suppressed the evidence because I felt that way, the warrant was absolutely insufficient, and they overruled and sent it back saying the evidence shouldn't have been suppressed. So I haven't been able to read that in any detail but I want to tread that and see. So what I'll do is I'm not going to grant your motion at this time. I'll take it under advisement, and let your know how I rule on it. When is this case set for trial?

****
****

VIRGINIA :
IN THE CIRCUIT COURT OF PITTSYLVANIA COUNTY

PARTIAL TRANSCRIPT OF TRIAL

UPON THE CONVENING OF COURT, on March 31, 2000, the case of COMMONWEALTH OF VIRGINIA v. SYLVESTER AARON BAKER was called at 9:00 o'clock A. M.., with both the Commonwealth and the Defendant announcing ready, the Court Reporter was duly sworn:

****
****

THE COURT: Alright , the Court also waives jury. Alright, Mr Baker, the Court finds that your pleas of not guilty is freely and voluntarily made. Is there a Motion for separation of witnesses?
MR. SHUPIK: Yes, Your Honor.
THE COURT: Let's separate the witnesses. (The witnesses were separated form the Courtroom at this time.)
THE COURT: Alright, opening statements gentlemen?
MR. GRIMES: Your honor, before we get to that, I understand the Court took under advisement the ruling on the search issue and we would like to address that before.
THE COURT: Well, I don't know whether counsel has anymore, but I think, Mr. Shpik, after reviewing the facts, and reviewing this most recent decision, I'm going to find that the search warrant, while there may have been some problems with it, the good faith defense is going to apply in this case, and I'm going to deny the suppression of the....
MR. SHUPIK: Thank you sir.
THE COURT: Alright, your exception will be noted for the record.
MR. SHUPIK: Thank you.

COURT OF APPEALS OF VIRGINIA

Present: Judges Frank, Agee and Senior Judge Coleman

Argued at Salem, Virginia

MEMORANDUM OPINION

BY JUDGE SAM W. COLEMAN, III

SYLVESTER AARON BAKER

v. Record No.1142-00-3

JUNE 19, 2001

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF PITTSYLVANIA COUNTY

Charles J. Strauss, Judge

J. Patterson Rogers, III, for appellant.

Kathleen B. Martin, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

Sylvester Aaron Baker, appellant, appeals his felony conviction of possession of a firearm by a convicted felon, in violation of Code § 18.2-308.2. Appellant presents three issues for review: (1) whether the search warrant's affidavit contained adequate indicia of the informer's reliability to establish probable cause; (2) whether the good faith exception to the exclusionary rule applies; and (3) whether the evidence was sufficient to find appellant in possession of the firearm. Although the affidavit did not provide adequate indicia of the informer's reliability to establish probable cause, the officers acted in good faith reliance on the validity of the search warrant. Further, the evidence supported the finding that appellant was in possession of the firearm. Therefore, the judgment of the trial court is affirmed.

BACKGROUND

In support of a request for a search warrant for appellant's residence, Investigator Jesse Tate cited the following material facts in his affidavit to establish probable cause:

Within the past forty-eight hours, an informant visited the residence, and saw crack cocaine on the premises.

Crack cocaine remained on the premises when the informant left the residence. The informant also stated that the persons at the residence also keep cocaine on there [sic] person.

To establish the informer's reliability, the affidavit stated:

The informant has provided information to the Pittsylvania County Sheriffs [sic] Office in the past that has been true and reliable[.] This informant also is aware of what crack cocaine is and knows what it looks like. The Pittsylvania County Sheriffs [sic] Office has received numerous complaints in the past regarding narcotic activity at the residence.

When Tate, and eight members of a S.W.A.T. team, executed the search warrant, Tate found appellant lying in his bed. Appellant told Tate he did not have any weapons in the room. Tate directed another deputy sheriff to search appellant, who is a paraplegic. Appellant then told Tate he was lying on a gun. They retrieved a 9mm handgun that was under a pad, below appellant's right hip, and within his reach.

Appellant's stepson, Kevin Coleman, testified he owned the handgun found in appellant's bed. He stated he had been to the residence the day before the search warrant was executed and had taken a nap in appellant's bed. He testified he placed the gun under the bedding near the foot of the bed. When he left for work, he forgot about the gun. He called appellant later that evening to tell him about the gun and that he would come the next day to retrieve it.

Appellant testified that Coleman called him to tell him about the gun. He conceded he "probably" touched the gun and looked at it, but that he could not put it out of his reach

because he is paralyzed from the upper chest down to his lower extremities. Although he had relatives who lived nearby, he did not trust them to take possession of the gun and decided to wait for Coleman to come the next day to get it. He initially forgot about the gun when the deputies arrived, but told Tate about the weapon when he remembered.

ANALYSIS

The Search Warrant

"The fourth amendment requires that a warrant to search shall issue only on probable cause supported by oath or affirmation." Boyd v. Commonwealth, 12 Va. App. 179, 185, 402 S.E.2d 914, 918 (1991). The probable cause inquiry conducted by the magistrate entails "a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him ..... there is a fair probability that contraband or evidence of a crime will be found in a particular place." Appellate review of a magistrate's probable cause determination is deferential in nature. [A] reviewing court must decide "whether the evidence viewed as a whole provided a 'substantial basis' for the [m]agistrate's finding of probable cause." Id at 185-86, 402 S.E.2d at 918 {citations omitted) ."A probable cause determination breaks down into 'the informant's veracity or reliability and his basis of knowledge. I" Corey v. Commonwealth, 8 Va. App. 281, 287, 381 S.E.2d 19, 22 {1989) {citation omitted)

"The reliability of any informant. ..can be demonstrated if the affidavit states that the informant has given information which has proven correct, if there is corroboration of other information supplied by the informant, or if the informant makes a declaration against his own penal interests." Id. at 288, 381 S.E.2d at 23 {citations omitted) ."A mere allegation that the affiant has 'received information from a reliable informant is insufficient to show

that an informant is credible, or that his information is reliable." Id. (citation omitted) .The magistrate cannot rely on the conclusory averments of the affiant, or those of the informant, id. at 288, 381 S.E.2d at 22, without a showing of why the informant is reliable and how recently he has given information that proved to be reliable. See Wiles v. Commonwealth, 209 Va. 282, 163 S.E.2d 595 (1968) . While the affidavit suggested the informant had personal knowledge of the presence of crack cocaine in the residence by virtue of his having been in the residence, the affidavit does not give an adequate showing of the informant's reliability or credibility. Tate presented conclusory statements that his informant had given reliable information in the past and failed to articulate how the sheriff's office confirmed the reliability of the informant's information by indicating whether the information led to arrests or was corroborated by further investigation. Tate also failed to establish how recently in the past the informant proved to be reliable.

Additionally, Tate failed to show any corroboration of the informant's information about appellant's residence. Stating that the sheriff's office had received numerous complaints of narcotic activity at the residence did not provide adequate probable cause or credible corroboration of the information. See id. at 286, 163 S.E.2d at 598. Therefore, the magistrate did not have sufficient probable cause from the affidavit to have issued the search warrant.

However, "suppression of evidence obtained pursuant to a warrant should be ordered only on a case by case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." United States v. Leon, 468 U.S. 897, 918 (1984) . " The purpose of the exclusionary rule historically was to deter police misconduct rather than to punish the errors of magistrates. This deterrent is absent where an officer, acting in objective good faith, obtains a'. search warrant from a magistrate and acts within the scope of the warrant." Derr v. Commonwealth, 242 Va. 413, 422, 410 S.E.2d 662, 667 (1991) (citation

omitted) . "Unless a magistrate has abandoned his detached and neutral role, suppression is only appropriate if an officer is dishonest or reckless in preparing his affidavit or could not have 'harbored an objectively reasonable belief in the existence of probable cause.'" Corey, 8 Va. App. at 288, 381 S.E.2d at 23 (citation omitted).

The record does not suggest that Tate acted dishonestly or recklessly in obtaining the search warrant. Tate was familiar with his informant and articulated facts he thought sufficient to establish probable cause.

It is the magistrate's responsibility to " determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form to the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law." 468 U.S. at 921 {citation omitted). Tate, therefore, acted in good faith reliance on the validity of the search warrant and the trial court did not err by refusing to suppress the firearm.,

Sufficiency of the Evidence

"On appeal, 'we review the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom."' Archer v. Commonwealth, 26 Va. App. 1, 11, 492 S.E.2d 826, 831{1997) {citation omitted). "The credibility of the witnesses and the weight accorded the evidence are matters solely for the fact finder who has the opportunity to see and hear that evidence as it is presented." Sandoval v. Commonwealth, 20 Va. App. 133, 138, 455 S.E.2d 730, 732 {1995) ."In its role of judging witness credibility, the fact finder is entitled to disbelieve the self-serving testimony of the accused. ..." Marable v. Commonwealth, 27 Va. App. 505, 509-10, 500 S.E.2d 233, 235 {1998) .The trier of fact is

not required to accept a party's evidence in its entirety, Barrett v. Commonwealth, 231 Va. 102, 107, 341 S.E.2d 190, 193 (1986), but is free to believe and disbelieve in part or in whole the testimony of any witness, Rollston v. Commonwealth, 11 Va. App. 535, 547, 399 S.E.2d 823, 830 (1991).

In the light most favorable to the Commonwealth, the evidence proved appellant denied having any weapons until Tate advised appellant he would be searched. At that point, appellant told Tate he was lying on a gun. The officer retrieved a gun from underneath a pad beneath appellant's right hip.

Under a theory of constructive possession, "the Commonwealth must point to evidence of acts, statements, or conduct of the accused or other facts or circumstances which tend to show that the defendant was aware of both the presence and character of the [contraband] and that it was subject to his dominion and control." Powers v. Commonwealth, 227 Va. 474, 476, 316 S.E.2d 739, 740 (1984). Appellant conceded knowledge by revealing to Tate the presence and location of the gun. Appellant also conceded exercise of dominion and control when he admitted that he "probably" retrieved the gun and looked at it.

Code § 18.2-308.2 also requires a finding that the possession be intentional. Even assuming the trial court found appellant's evidence to be credible, the evidence, nevertheless, proved intentional possession of the firearm. While appellant's paralysis may have precluded him from personally dispossessing himself of the gun, nothing prevented him from calling friends, family or neighbors to remove the gun or demanding that his stepson immediately return to retrieve the gun. Nor does his paralysis explain why he secreted the gun with its ammunition back under the bedding. These facts show appellant intentionally maintained possession of the firearm. Therefore, the evidence established beyond a reasonable doubt that appellant, a convicted felon, possessed a firearm.

For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.

VIRGINIA :

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond, on Friday, ***the*** 9th ***day of*** November, 2001.

Sylvester Aaron Baker,
Appellant,

against

Record No.011599 II
Court of Appeals No.1142-00-3I

Commonwealth of Virginia,
Appellee

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,
Teste:

David B. Beach,
Clerk

VIRGINIA :

In the Supreme Court of Virginia at the Supreme Court Building in the City of Richmond, on Friday, ***the*** 11th ***day of*** January, 2002.

Sylvester Aaron Baker, Appellant,

against Record No.011599
Court of Appeals No.1142-00-3

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 9th day of November, 2001 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,
Teste:

David B. Beach,
Clerk